U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: March 22, 2002

BALCA Case No.: 2001-INA-90
ETA Case No.: P1997-CA-09057076/ML

In the Matter of:

JAMES AND MARIA NAUMAN,
Employer,

on behalf of

RUTH CASTILLO,
Alien

Appearances: Luis A. Sabroso, Esquire

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification filed by James and Maria Nauman for the position of Child Monitor/Tutor. (AF 16-17).[1] Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656. The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. §656.27(c).

STATEMENT OF THE CASE

On November 20, 1995, Employer, James and Maria Nauman, filed an application for alien employment certification on behalf of the Alien, Ruth de Carmen Castillo, to fill the position of Child Monitor/Tutor. The job to be performed was described as follows:

> The individual must observe, supervise, and monitor the children's activities. Amuse them by playing games or reading to them. Must also prepare their meals and snacks.

[1] "AF" is an abbreviation for "Appeal File."

> Must be experienced in bathing and dressing children. The individual must be responsible for washing and ironing the children's clothing, as well as keeping their room clean and organized. Light housework will also be expected. When weather permits, this individual is to take the children for walks or other outside activities. Must tutor children in the Spanish language along with the culture and history. The individual will educate the children by teaching them to speak, write and read the Spanish language.

Total hours of employment were listed as 40 hours per week, from 7:00 a.m. to 3:30 p.m. Minimum requirements for the position were listed as two years experience in the job offered, experience with non-hazardous chemicals and domestic equipment, and bilingual ability in Spanish and English.

By letter dated August 9, 1996, the Local Job Service notified Employer that its two year experience requirement was excessive in that the usual amount of education, training and/or experience for the occupation of Children's Tutor is from six months to one year. (AF 40-41). Employer responded that two years was an essential requirement in order to trust the individual with their children. (AF 21).

On December 30, 1996, Employer reported that they had received no applicant referral in response to their recruitment efforts. (AF 22).

A Notice of Findings (NOF) was issued by the Certifying Officer (CO) on September 6, 2000, proposing to deny labor certification based upon a finding that Employer's job requirement of two years experience in the job offered is unduly restrictive, and thus in violation of 20 C.F.R. § 656.21(b)(2)(i)(A). The CO considered Employer's contention that they could only trust someone with two years experience a preference, insufficient to justify exceeding the Specific Vocational Preparation time for the occupation of Children's Tutor, 099.227-010, as listed in the *Dictionary of Occupational Titles* (DOT). Employer was instructed to rebut the findings by either deleting the restrictive requirement and retesting the labor market; by documenting that the requirement is a common one for the occupation in the United States; or by justifying the restrictive requirement on the basis of "business necessity." In addition, the NOF found that the Alien did not meet the requirements of the job as set forth on the ETA 750, Part A in that she lacked "childrens tutor experience." Employer was instructed to either amend the ETA 750 B form to reflect such experience if she in fact possesses it or amend the requirements and readvertise. (AF 12-15).

In Rebuttal Employer attempted to document business necessity for their experience requirement, stating that the prospective employee must have two years experience in order to ensure the safety of their children. Employer asserts that someone with less than two years experience with one employer raises issues of reliability and the individual's performance (*i.e.* that the person may have been unreasonable, unpleasant or caused physical or mental harm to the children). In addition, Employer submitted an employer reference letter stating that the Alien gained experience as a Child Monitor/Tutor from 1995 to 1998. (AF 4-7).

A Final Determination denying labor certification was issued by the CO on December 22, 2000. The CO noted that the DOT is authoritative as a source for the amount of experience normal in the U.S. labor market for the occupation. The CO observed that Employer had failed to provide **documentation** that their requirement was usual and reasonable, and hence, concluded that Employer had failed to justify the need for the more stringent two years' experience requirement. The CO also found Employer's rebuttal regarding the Alien's experience in the job offered lacking in that it showed the Alien as gaining the Child Monitor/Tutor experience from 1995 to 1998, and thus not prior to the filing of this application. (AF 2-3).

Employer filed a Request for Administrative-Judicial Review on January 6, 2001.(AF 1). The matter was docketed in this office on April 13, 2001.

DISCUSSION

In seeking alien employment certification, pursuant to 20 C.F.R. § 656.21(b)(2), an employer is required to document that its requirements for the job opportunity, unless adequately documented as arising from business necessity, are those normally required for the performance of the job in the United States. One of the measures by which a job requirement is tested to determine whether it is unduly restrictive is inclusion of the requirement in the definition of the job in the *Dictionary of Occupational Titles* (DOT). To determine whether a particular job requirement falls within the applicable DOT code, the CO must determine the job title which best describes the job and determine whether the job requirements specified by the employer fall within those defined in the DOT. *LDS Hospital*, 1987-INA-558 (Apr. 11, 1989)(*en banc*). Where the employer cannot document that the job requirement is normal for the occupation or that it is included in the DOT, Employer must establish business necessity for the requirement. 20 C.F.R. § 656.221(b)(2). Pursuant to the Board's holding in *Information Industries, Inc.*, 1988-INA-82 (Feb 9, 1989)(*en banc*), in order to establish "business necessity" an employer must show that the requirement bears a reasonable relationship to the occupation in the context of employer's business and that the requirement is essential to performing, in a reasonable manner, the job duties as described.

The DOT prescribes the Specific Vocational Preparation time for the occupation of Child Monitor/Tutor, 099.227-010, as six months to one year. On this basis, the Local Job Service and the CO found Employer's two year experience requirement excessive for the job being offered. Employer's sole justification for their more stringent two year requirement is that they will be leaving "their most valuable assets", *i.e.* their children, with this Child Monitor and that two years' experience is necessary in order to ensure their safety. Employer contends that "someone who only has six months to one year experience with only one family is not found to be capable or as well experienced as would an individual who has two years of experience." However, as was noted by the CO, if Employer's basis for justification - simply that more means better - is accepted, what would prevent the employer from demanding unlimited years of experience?

The DOT is authoritative as a source for the amount of experience normal in the U.S. labor market for the occupation. Employer has not shown why a worker with six months' to one years'

experience could not adequately perform the job. Employer's preference for a worker with more experience has not been adequately documented as either arising from business necessity or customary in the occupation/industry. Employer has failed to demonstrate that their two year experience requirement is essential to reasonable performance of the job, and accordingly, we conclude that labor certification was properly denied.

Moreover, we further conclude that labor certification must be denied on the basis that the Alien did not possess the required experience at the time of petition, and hence, Employer did not offer U.S. workers the same opportunity as that given the Alien. Employer requires two years experience as a Child Monitor/Tutor. The record reflects that the Alien had eight years experience in the duties of a Child Monitor from 1987 to 1995. As described, the duties performed did not include those of a Tutor. (AF 56-58). The record reflects that the Alien was employed as a Child Monitor/Tutor performing the duties of both monitoring and tutoring from May 1995 to September 1998. (AF 7). This application was filed on behalf of the Alien on November 20, 1995, however, at which time the Alien did not have a full two years experience in the job offered. Thus, labor certification was properly denied on this basis as well.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED** and labor certification is **DENIED.**

SO ORDERED.

Entered at the direction of the panel by:

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Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must

be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.